No. 21567

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELDON O. HALDANE,

Appellant,

vs.

WILHELMINA HELEN KING CHAGNON, HORACE N. FREEDMAN, LEONARD S. SANDS, GORDON THOMPSON, WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,

Appellees.

APPELLEES CHAGNON AND FREEDMAN'S JOINT BRIEF.

JARRETT & WOODHEAD,
315 West Ninth Street,
Los Angeles, Calif. 90015,
Attorneys for Appellee Chagnon

and

BRILL, HUNT, DE BUYS & BURBY,
510 South Spring Street,
Los Angeles, Calif. 90013,
Attorneys for Appellee Freedman.

ABE MUTCHNIK,
510 South Spring Street,
Los Angeles, Calif. 90013,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

Page

Discussion 4

I.

The Complaint Fails to State a Claim Against Appellees Chagnon and Freedman, Attorneys in Private Practice and Not Acting Under Color of State Law or Authority, and the District Court's Dismissal of This Cause Can Be Sustained on This Ground 4

II.

The Dismissal of This Cause Can Also Be Sustained on the Ground That It Is Barred by the Applicable Three-Year Statute of Limitations .. 15

III.

The Dismissal of This Cause Can Also Be Sustained Under the Doctrine of Res Judicata 19

IV.

The Dismissal of This Cause Can Also Be Sustained Under the Principle of Stare Decisis 26

Conclusion 29

TABLE OF AUTHORITIES CITED

Cases

Byrne v. Kysar, 347 F. 2d 734, cert. den. 383 U.S. 913 9
Cooper v. Wilson, 309 F. 2d 153 13
Crawford v. Zeitler, 326 F. 2d 119 .....18, 25
Haldane v. Chagnon, et al., 345 F. 2d 601 .....2, 3, 8, 9, 14, 15, 20, 26, 27
Kenney v. Fox, 232 F. 2d 288 9
Kenney v. Hatfield, 132 F. Supp. 814 11
Lambert v. Conrad, 308 F. 2d 517 .....16, 18
Meier v. State Farm Mutual Auto Ins. Co., 356 F. 2d 504 9
Minchella v. Estate of Skillman, 356 F. 2d 52 18
Rhodes v. Houston, 309 F. 2d 959 .....21, 24
Rhodes v. Meyer, 334 F. 2d 709 .....21, 27, 28
Skolnick v. Martin and Skolnick v. Spolar, 317 F. 2d 855, 317 F. 2d 857 13
Smith v. Cremins, 308 F. 2d 187, 98 A.L.R. 2d 1160 18
Swan v. Board of Higher Education of City of New York, 319 F. 2d 56 18
Whittington v. Johnston, 201 F. 2d 801 12

Statutes

Code of Civil Procedure, Sec. 338(1) 18
United States Constitution, Fourteenth Amendment 14

Textbooks

21 Corpus Juris Secundum, Sec. 197, pp. 343-345 .. 27
50 Corpus Juris Secundum, Sec. 592, p. 11 20

No. 21567

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELDON O. HALDANE,

Appellant,

vs.

WILHELMINA HELEN KING CHAGNON, HORACE N. FREEDMAN, LEONARD S. SANDS, GORDON THOMPSON, WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,

Appellees.

APPELLEES CHAGNON AND FREEDMAN'S JOINT BRIEF.

Appellees Chagnon and Freedman, jointly, but for themselves alone and for no other appellee, respectfully file this brief in answer to appellant's Opening Brief and in support of the judgment of the District Court dismissing appellant's action on the ground that it fails to state a claim upon which relief can be granted against these, and the other, appellees.

Appellant's Complaint in this cause was brought under the Civil Rights Act, for the alleged deprivation of his civil rights in relation to certain psychiatric court proceedings conducted by the Superior Court of Los Angeles County, California. In respect to appellees Chagnon and Freedman, the Complaint alleges that these appellees, attorneys at law engaged in private practice, prevailed upon a judge of the Superior Court

to commence the psychiatric court proceedings; all of which were undertaken and conducted exclusively by officers and officials of the Superior Court; wherein appellant was examined in respect to his mental competency.

In the case of *Haldane v. Chagnon, et al.,* 345 F. 2d 601, the Ninth Circuit had considered a similar complaint under the Civil Rights Act, *filed (in 1964) by the same individual who is the appellant in this cause,* with the same District Court which later adjudicated the within Complaint; which earlier complaint likewise related to the *same psychiatric court proceedings involved at bar,* and similarly charged appellees Chagnon and Freedman with "instigating" the course of these proceedings. The 1964 complaint had also been dismissed; and later, in *affirming* the judgment of dismissal, this Circuit ruled that no cause of action lay against appellees Chagnon and Freedman—who, in respect to all the acts charged by appellant, had proceeded in the role of private individuals, not acting under color of State law or authority.

Accordingly, as will hereinafter be shown in this brief under "Discussion", by appropriate references to the Transcript of Record filed in this cause and to applicable case law and authority, *the judgment of dismissal entered herein in favor of appellees Chagnon and Freedman is correct and proper; and can be sustained on at least the following four grounds:*

1. No cause of action for the alleged deprivation of appellant's civil rights can lie against appellees Chagnon and Freedman, attorneys in private practice and not acting under color of State law or authority.

2. The applicable statute of limitations for actions under the Civil Rights Act in respect to any particular defendant, is three years from the date of the last overt act charged against that defendant; and the Complaint herein shows on its face that the last allegedly overt act attributed both to appellee Chagnon and to appellee Freedman occurred almost *five* years prior to the date the Complaint was filed. Accordingly, the Complaint is barred, against these appellees, by the statute of limitations.

3. In his 1964 complaint, based on the same cause of action, appellant also named appellees Chagnon and Freedman as defendants. The complaint was dismissed, and judgment of dismissal entered in favor of these two appellees, and others. Thereupon the judgment of dismissal was affirmed on appeal, in *Haldane v. Chagnon, et al.,* 345 F. 2d 601. Accordingly, appellant's current Complaint against these two appellees is barred by the doctrine of *res judicata.*

4. Because the dismissal of the 1964 complaint was appealed, and thereupon affirmed by the Ninth Circuit, the decision therein affirming the dismissal is binding on the District Court herein, under the principle of *stare decisis,* and this doctrine compels a similar dismissal of the Complaint at bar.

For the foregoing reasons, hereinafter thoroughly detailed under "Discussion", appellees Chagnon and Freedman respectfully urge that the District Court has properly dismissed the Complaint at bar in respect to them, and that the judgment of dismissal entered in their favor herein should be affirmed.

DISCUSSION.

I.

The Complaint Fails to State a Claim Against Appellees Chagnon and Freedman, Attorneys in Private Practice and Not Acting Under Color of State Law or Authority, and the District Court's Dismissal of this Cause Can Be Sustained on this Ground.

It is patently obvious that the Complaint herein fails to state a claim, for the alleged deprivation of appellant's civil rights, against appellees Chagnon and Freedman, attorneys in private practice and not acting under color of State law or authority; and the District Court's dismissal of the Complaint and entry of judgment in favor of these appellees [R. 111][1] can be sustained on this ground.

In the first instance, the Complaint (para. 3) *concedes* that appellees Chagnon and Freedman are duly licensed attorneys, engaged in the private practice of law [R. 2]:

> "That at all times herein mentioned, defendants Chagnon [and] Freedman . . . were and are licensed attorneys at law, members of the bar of the United States District Court for the Southern District of California and of all the courts of California."

Thereafter the Complaint alleges certain "overt acts" purportedly committed by appellees Chagnon and Freedman; which acts allegedly contributed toward the initial calendering of a hearing involving appellant con-

[1]All pagination given in this brief is that of the Transcript of Record.

ducted by the psychiatric department of the Los Angeles County Superior Court; which hearing was held on March 10, 1961 [R. 15]. It is this hearing, appellant alleges in Opening Brief, pages 1, 2, that purportedly:

> ". . . deprived plaintiff of right, privileges and immunities secured to plaintiff by the United States Constitution, and particularly secured to him by the Civil Rights Act, 42 U. S. C. 1985(3) and Sec. 1, Amendment 14 of the Constitution (R2) by seizing and imprisoning plaintiff without warrant or probable cause (R 3-15 incl.) denied bail (R 5, par. 14) under pretense or pretext of an absolutely void insanity 'or mental illness' (R 10-15 inclusive) proceeding—a complete nullity on its face, *by reason of which plaintiff sought damages under the Federal Civil Rights Act* and other relief (R 9)." (Emphasis supplied).

And, when the *Complaint* itself is examined in respect to the purported "overt acts" of appellees Chagnon and Freedman in relation to the psychiatric hearing of which appellant complains, *all that is to be found therein pleaded in this respect is the following* (All emphases supplied):

> "*Overt Act No. 1* was committed on *March 8, 1961,* when Chagnon and Freedman went secretly and surreptitiously to the office of Lloyd S. Nix, one of the judges of Los Angeles Superior Court, ostensibly to discuss, ex parte and without notice to plaintiff, same facet of case No. MWD 724, styled Haldane v. Haldane, in which the said Nix had on July 6, 1960 determined to grant an inter-

locutory decree of divorce, which said interlocutory was entered on July 27, 1960"—para. 7 [R 3].

"For the specific purpose of depriving this plaintiff of Equal Protection of the Laws, the said Chagnon made unsworn false statements to Nix in the presence of and with full acquiescence by Freedman, charging that this plaintiff was violent and dangerous, thereby deliberately misleading and deceiving the said Lloyd S. Nix, judge, who thereupon telephoned Department 95, the psychiatric department of Superior Court in which he had presided, and suggested, at the urging of Chagnon and Freedman, that this plaintiff should be arrested and imprisoned on an insanity charge, euphemestically referred to as 'mental illness,' and that Chagnon and Freedman were being dispatched to Department 95 to institute proceedings." —para. 9 [R. 4].

"Whereupon, Chagnon and Freedman did *on March 8, 1961* commit *Overt Act No. 2* by proceeding in Freedman's car driven by Freedman, to the psychiatric department at the Los Angeles County General Hospital; Chagnon, who does not drive, alighted and entered the building; Freedman did nothing to dissuade her: Freedman did not withdraw from the conspiracy to deprive plaintiff of the Equal Protection of the Laws, but permitted his accomplice to proceed."—para. 10 [R. 4].

"That *on said date—March 8, 1961*—defendant Chagnon did commit *Overt Act No. 3* by entering the building, engaging a deputy clerk of Superior Court, Bertha Kaminker, in discussion about this plaintiff and causing the said Bertha Kaminker to prepare a so-called petition under the pretext of Sections 5047 et seq Welfare & Inst. Code, which absolutely void 'petition,' No. 188329, Department 95—a complete nullity on its face—is attached hereto as *Exhibit A,* incorporated and made a part of this paragraph"—para. 11 [R. 4].

(Purported "Overt Acts" 4 through 6 are alleged in the Complaint to have been committed by other defendants, entirely exclusive of appellees Chagnon and Freedman).

"*Overt Act No. 7* occurred about *May 1961* when defendant Chagnon substituted herself out of case NWD 724 after she and Freedman had persuaded Rosamond B. Haldane that defendants Sands and Thompson take over the case. She thus left her helpless client destitute, at the absolute mercy of Sands and Thompson"—para. 17 [R. 6].

The foregoing then, constitutes the complete charge made against appellees Chagnon and Freedman, throughout the entire Complaint. And in respect to these allegations, even if they be accepted as completely true (*arguendo*), it is nevertheless settled law that *no cause of action for the alleged deprivation of appellant's civil rights can lie against appellees Chagnon and Freedman*—who acted while they were attorneys in

private practice, and not as state functionaries proceeding under color of law—*for the mere alleged "instigation" of the psychiatric court proceedings, all of which were conducted solely and exclusively by judges and other officials of a duly constituted court of law.*

In *Haldane v. Chagnon, et al.,* 345 F. 2d 601 (9 Cir. 1965) a case involving the *same plaintiff as at bar, brought against the same two defendants Chagnon and Freedman* (and others) and based on the same facts and alleged cause of action, the Ninth Circuit said, in affirming a dismissal of the complaint and the subsequent judgment, at pages 604, 605:

> "With the elimination of the defendant judges and bailiff from the case [because of judicial immunity] claims against the defendant attorneys under the Civil Rights Act cannot be stated. The attorneys were not State officers, and they did not act in conspiracy with a State officer against whom appellant could state a valid claim. It follows that they did not, and could not, commit the alleged wrongful acts 'under color of state law or authority'; hence, they are not subject to liability under the Civil Rights Act. Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948), Skolnick v. Martin, 317 F.2d 855 (7th Cir. 1963), Skolnick v. Spolar, 317 F.2d 857 (7th Cir. 1963), Swift v. Fourth National Bank of Columbus, Georgia, 205 F.Supp. 563 (D.C.M.D.Ga.1962). See also, Hoffman v. Halden, supra (268 F. 2d 280 (9th Cir. 1959))."

Since the publication of the afore-cited opinion in *Haldane v. Chagnon,* the Seventh Circuit has reported

the case of *Byrne v. Kysar,* 347 F. 2d 734 (7 Cir. 1965), cert. denied in 383 U.S. 913, which is again a "white horse" case with the cause at bar.

In *Byrne*, the plaintiff's wife and her attorney, Francis E. Schlax, instigated the plaintiff's confinement as a mentally ill person, under the provisions of the Illinois Mental Health Code.

Subsequently the plaintiff brought an action in the District Court of Illinois against attorney Schlax, and against the examining doctors and an assistant state's attorney who had signed the petition for confinement —on the theory that all the defendants had conspired to deprive him of his civil rights.

The District Court dismissed the complaint and refused the plaintiff's motion for leave to file an amended complaint; and the Seventh Circuit affirmed.

In respect to the private attorney, the Seventh Circuit said, at page 736:

> ". . . Defendant Schlax's participation in the proceeding as a private lawyer did not make him a state functionary acting under color of law within the meaning of the Federal Civil Rights Act. Skolnick v. Martin, 7 Cir., 317 F. 2d 855, 857. . . ."

Also in accord in dismissing a complaint for an alleged deprivation of civil rights on the part of an attorney, is *Meier v. State Farm Mutual Auto Ins. Co.,* 356 F. 2d 504 (7 Cir. 1966), cert. denied, likewise decided since *Haldane v. Gagnon.*

And see *Kenney v. Fox,* 232 F. 2d 288 (6 Cir. 1956) wherein the plaintiff was committed to a Michigan State hospital for the mentally ill. Subsequently

the commitment was actually determined to be void, because the commitment proceedings had not complied with statute (at bar it is clear that all psychiatric proceedings taken by the court authorities in respect to Haldane were regular, proper and in express compliance with statute, under the provisions of the California Welfare Institutions Code). Thereupon the plaintiff brought separate actions in the District Court against one: "Thomas N. Robinson, *an attorney, on whose alleged recommendation the commitment of plaintiff was made*" (p. 289—emphasis supplied); and against the deputy sheriff who had prepared the petition for the commitment and the trial judge who had ordered the commitment—on the ground that all of these defendants had violated his civil rights.

The Sixth Circuit affirmed the judgment in favor of all the defendants; and *in respect to the attorney who had allegedly recommended that the petition for commitment be filed,* the Court said, at pages 289, 290:

> "The district court sustained the motions of all the defendants to dismiss for the reasons stated by District Judge Kent in his carefully prepared opinion in *Kenney v. Hatfield,* D.C.W.D. Mich, 132 F. Supp. 814. The facts, being adequately stated there, will not be repeated here. . . . We are in accord with his reasoning, 132 F. Supp. 817, that *Robinson, a private practitioner, in preparing the papers filed as the first step in the proceedings resulting in Kenney's commitment to the Kalamazoo State Hospital, was not amenable to an action based on the civil rights statute.* See *Whittington v. Johnson,* 5 Cir., 201 F. 2d 810, 811, cited in the opinion of the United States District Judge." (Emphasis added).

The opinion of the trial court with which the Sixth Circuit indicated accord, *Kenney v. Hatfield,* 132 F. Supp. 814, was as follows, in respect to the attorney defendant, at page 817:

> "As to the defendant, Thomas N. Robinson, the allegations of plaintiff's complaint are to the effect that said defendant, then an attorney in private practice, advised Deputy Sheriff Pugh in connection with the preparation of the petition which was filed as the first step in the proceedings which resulted in plaintiff's commitment to the Kalamazoo State Hospital. *There is no allegation that the defendant Robinson was acting in any official capacity or that any of his acts, proper or improper, could be classed as the acts of the State of Michigan,* except as the petition was made allegedly pursuant to the provisions of the statutes of the State of Michigan. *No case has been discovered wherein the Civil Rights Statute, on* which plaintiff bases his action, *has been held to give one in the position of the plaintiff an action against a private individual not acting 'under color of law' for wrongs done,* even though the acts of such individual may have ultimately resulted in a deprivation of constitutional rights, privileges or immunities. Rather such statute appears to have been limited in application to persons who have used or misused the powers granted to them by virtue of political offices, held by them, for the purpose of *wilfully* depriving a person of constitutional rights, privileges or immunities. *Williams v. Yellow Cab Co. of Pittsburgh,* 3 Cir. 1952, 200 F. 2d 302; *Shemaitis v. Froemke,* 7 Cir., 1951, 189 F. 2d 963; *Watkins v. Oaklawn Jockey Club,* 8 Cir., 1950, 183 F. 2d 440.

"As stated in *Whittington v. Johnston,* 5 Cir., 1953, 201 F. 2d 810, at page 811—

'It is a non sequitur to say that merely by instituting the lunacy proceedings, the defendants "caused" plaintiff to be deprived of her right to due process within the meaning of 8 U.S.C.A. § 43. [Now 42 U.S.C. 1983]. If there was any denial of due process, the efficient cause thereof was the omission of the state probate judge to give notice of the proceeding. That failure is not attributable to these defendants. Whether or not notice should be given is committed by the Alabama statute to the discretion of the probate judge. These defendants had no duty in that behalf. They simply instituted the lunacy proceeding as the Alabama statute authorized them to do, and left the conduct thereof wholly to the discretion of the probate judge whose duty and function it was to give any necessary notice.'

"It appears to this court that the reasoning set forth in the quotations applies to the claims asserted by the plaintiff against the defendant, Thomas N. Robinson.

"It is the conclusion of this court that the allegations of fact and the statute on which this action is based do not permit the granting of relief for the actions of persons acting as private citizens." (Emphasis partially supplied.)

In *Whittington v. Johnston,* 201 F. 2d 801 (5 Cir. 1953), cited by the *Kenney* trial judge, the plaintiff had likewise filed a complaint in which she alleged that the defendants, private citizens, had: "conspired to, and did, cause plaintiff to be declared insane by an Ala-

bama probate court when she was in fact sane, and caused her to be confined for five days in a county jail awaiting commitment to a mental institution" (pp. 810, 811). The trial court dismissed the complaint and in affirming the judgment the Fifth Circuit said, at page 812:

> ". . . 8 U.S.C.A. Sec. 43 [now *42 U.S.C. 1983*] . . . *does not require those who regularly institute a lunacy proceeding under a state statute to stand sponsor for the validity of the statute, nor for the acts of the state officers in administering it.*
>
> ". . . Neither the Fourteenth Amendment nor the Civil Rights Acts purport to secure a person against unfounded or malicious lunacy proceedings. If the facts here involved make out a case of false arrest or malicious prosecution, the redress of such wrongs is left with the states (Citations)" (Emphasis added).

Again, in *Cooper v. Wilson,* 309 F. 2d 153 (6 Cir. 1962), the plaintiff alleged that the defendant attorney had made false statements against her in a sanity hearing, as the result of which she was committed to a mental institution, and that thereby she had been deprived of her civil rights. The trial court dismissed the complaint, and in affirming, the Sixth Circuit said, at page 154:

> "Appellee, acting as a private lawyer, charged with making false statements in sanity proceedings which resulted in appellant's commitment to Longview State Hospital, a mental institution, was not amenable to action based on civil rights statute."

See, also, the cases of *Skolnick v. Martin* and *Skolnick v. Spolar,* 317 F. 2d 855 and 317 F. 2d 857,

respectively (7 Cir. 1963), cited in *Haldane v. Chagnon,* wherein the same plaintiff brought separate actions against certain attorneys who he claimed had deprived him of his civil rights by their activities in favor of the plaintiff's opponent in a state court litigation. The district court dismissed the complaint, and in affirming the Seventh Circuit said, at page 857:

> "Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Acts."

Appellant cites more than 65 case names in his Opening Brief, purportedly in support of his position. Yet, appellate counsel who is preparing this brief on behalf of appellees Chagnon and Freedman has actually examined *every single opinion cited by appellant;* and upon the basis of such thorough examination and review can say, with absolute sincerity, that *not even one such opinion is in point with the cause at bar*—excepting, of course, for the case of *Haldane v. Chagnon, et al.,* 345 F. 2d 601, which is very much in point.[2]

Of course, as has been shown herein, the *Haldane* case can hardly bring any comfort to appellant; and, in-

---

[2]With the exception of the *Haldane* case (which is, of course, entirely unfavorable to appellant) not even one other case cited by appellant involves attorneys at law, who, acting as private citizens, "instigated" any psychiatric court, or any other type of court, proceedings. Indeed, most of appellant's cited cases do not even involve actions under the Civil Rights Act (many were actually decided prior to the enactment of the 14th Amendment); and those that do primarily relate to the deprivation of the civil rights of Negroes (appellant is a white person), solely because of their race. Moreover, some of appellant's cases actually *affirm* a District Court's dismissal of a complaint for failure to state a claim against a defendant.

deed, he only cites it to argue that it was "erroneously decided" (Op. Br. p. 4), "wrongly decided" (Op. Br. p. 9) and "should be overruled" (Op. Br. p. 20).

Appellant fails to cite even a single authority in support of his attack on the *Haldane* decision; and from the tenor of his comments about the case, it can only be assumed that he has evolved his belief that it is "erroneously and wrongly decided" only on the basis of a purely personal and subjective element: the fact that the opinion affirms a judgment *against* him.

It is a concomitant principle, pronounced in conjunction with the one that holds that a litigant is entitled to his day in court, that once the litigant has *had* that day, and has been accorded a fair hearing and the proper right of appeal (as has occurred at bar) *there must finally be an end to the litigation.*

II.

The Dismissal of this Cause Can Also Be Sustained on the Ground that It Is Barred by the Applicable Three-Year Statute of Limitations.

It is also patently clear, from the face of the Complaint filed in this cause, that the within action against appellees Chagnon and Freedman is barred by the *statute of limitations;* and the District Court's act of dismissing the Complaint and entering judgment in favor of these appellees can be sustained on this ground.

As has heretofore been shown in the discussion under Section I of this brief, the Complaint specifically pleads that "Overt Act No. 1 (charged against both appellees Chagnon and Freedman) "was committed on *March 8, 1961*" (Cplt. para. 7); that "Overt Act No. 2" (charged against both appellees Chagnon and Freedman) was

committed on the same day—*March 8, 1961* (Cplt. para. 10); that "Overt Act No. 3" (charged against appellee Chagnon, only) was committed on the same day—March 8, 1961 (Cplt. para. 11); and that "Overt Act 7" (charged against appellee Chagnon, only) was committed "about May, 1961" (Cplt. para. 17).

And these are, of course, the only "overt acts" of which appellees Chagnon and Freedman are accused.

Indeed, the Complaint even shows on its face that the very psychiatric court hearing which is the subject matter of appellant's within action was held on *March 10, 1961* (Cplt. para. 15 [R. 5] and one Exhibit to the Complaint [R. 15]).

Yet the Complaint herein was filed on *January 23, 1966* [Transcript of Record, index]—almost *five years* after the alleged commission of all the aforesaid purported "overt acts" by appellees and the date of the very psychiatric court hearing of which appellant complains.

And it is settled law that *in respect to any action brought on the ground of deprivation of civil rights in a Federal District Court having its situs in California, the statute of limitations is three years; and that this limitations period commences to run, in respect to any particular defendant, from the date of the last overt act attributed to that defendant.*

In *Lambert v. Conrad,* 308 F. 2d 571 (9 Cir. 1962), a complaint brought under the Civil Rights Act was dis-

missed by the District Court of the Southern District of California, Central Division, as barred by the statute of limitations. On appeal the Ninth Circuit affirmed, and said at pages 571, 572:

> "This appeal is from an order dismissing an action as barred by the statute of limitations. *The complaint alleges a civil conspiracy under the Civil Rights Act.* 42 U.S.C.A. §§ 1983, 1985. *The applicable period of limitation is three years.* California Code of Civil Procedure, § 338(1); Smith v. Cremins, 9 Cir., 308 F.2d 187. *The last possible date from which the period could have commenced to run was that of 'the last overt act alleged from which damage could have flowed * * *.'* Hoffman v. Halden, 268 F.2d 280, 303 (9th Cir. 1959) (issue not affected by Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962). The last overt act alleged was the filing by appellee police officers of a charge against appellant for failure to register as a convicted felon as required by Sections 52.38 to 52.43 of the Municipal Code of the City of Los Angeles. The records of other courts in related proceedings, which we may notice for this purpose (St. Paul Fire & Marine Ins. Co. v. Cunningham, 257 F.2d 731 (9th Cir. 1958), conclusively establish that this act occurred more than three years prior to the filing of the present complaint. See Lambert v. People of State of California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed. 2d 228 (1957); Lambert v. Municipal Court of Los Angeles County, 53 Cal.2d 690, 3 Cal.Rptr. 168, 349 P.2d 984 (1960); vacating 343 P.2d 81, which vacated 334 P.2d 605. '[*S*]*ince injury and damage can only flow from overt acts,' the complaint is not saved by a general allegation that the conspiracy continued to a date within the limitations period.* Hoffman v. Halden, supra, 268 F.2d at 303." (Emphasis supplied).

In *Smith v. Cremins,* 308 F. 2d 187, 98 A.L.R. 2d 1160 (9 Cir. 1962), cited in *Lambert,* the Ninth Circuit had determined that: "Since the Civil Rights Act contains no provision limiting the time within which an action may be brought under Section 1983, the applicable period of limitation is that provided by the statutes of California—the state in which the present action arose and the District Court was located." (p. 189); and had decided that the California *three year* limitations section, Code Civ. Proc. Sec. 338(1), which related to actions based "upon a liability created by statute", was the pertinent limitations provision.

Also *in accord* with the rule of *Lambert:* that an action for deprivation of civil rights is barred by the statute of limitations which is in effect in the State which is the situs of the District Court hearing the action, and that the statute commences to run from the date of the last overt act, are *the following cases—in all of which complaints based on the Civil Rights Act were dismissed by the District Court and the dismissals affirmed on appeal:*

Swan v. Board of Higher Education of City of New York, 319 F. 2d 56 (2 Cir. 1963)—complaint barred by the applicable six-year statute of the State of New York;

Crawford v. Zeitler, 326 F. 2d 119 (6 Cir. 1964)—complaint barred by the applicable one-year statute of the State of Ohio;

Minchella v. Estate of Skillman, 356 F. 2d 52 (6 Cir. 1966), cert. denied—complaint barred by the applicable two-year statute of the State of Michigan.

III.

The Dismissal of This Cause Can Also Be Sustained Under the Doctrine of Res Judicata.

Moreover, it is also obvious that *the Complaint herein;* insofar as it purports again to name appellees Chagnon and Freedman as defendants, as did the 1964 complaint, in relation to *the same cause of action* which was the subject matter of the earlier complaint (now pursued to final judgment); *is now barred,* as to these two defendants, by the doctrine of *res judicata.* And the action of the District Court in dismissing the within Complaint and entering judgment in favor of these two defendants can be sustained on that ground.

On March 5, 1964, appellant herein commenced an action in the United States District Court, So. District of California, Central Division, being case number 64-293-CC [R. 32-43]. In said action, appellant likewise named as defendants Wilhelmina Helen King Chagnon and Horace N. Freedman, *the same individuals* who are named as defendants in the cause at bar.

As can be seen from an examination of the 1964 complaint, and the exhibits thereto, appellant similarly urged therein, as he does in the current Complaint at bar, that he was deprived of his civil rights by reason of *the very same* psychiatric court proceedings which are *the subject matter of the current Complaint.*

In respect to defendants Chagnon and Freedman, appellant likewise alleged in the 1964 complaint, in paragraph VII thereof [R. 34, lines 3-6], that these defendants "instigated" the commencement of the psychiatric court proceedings, by prevailing on Judge Nix of the Los Angeles Superior Court to undertake these pro-

ceedings—*precisely as appellant now again pleads in the current Complaint,* in paragraphs 7 and 9 [R. 3 and R. 4, respectively].

After the filing of the 1964 complaint, on May 12, 1964, the District Court dismissed the action, and in its judgment [R. 44-45], said, in respect to defendants Chagnon and Freedman [R. 44, line 31, to R. 45, line 1]:

> ". . . it is clear from the allegations that defendants, Wilhelmina Helen King Chagnon and Horace N. Freedman, were not acting under color of authority of any law."

On May 21, 1964, appellant gave notice of appeal from this prior judgment of dismissal; and on May 5, 1965, as heretofore shown, the Ninth Circuit, in *Haldane v. Chagnon, et al.,* 345 F. 2d 601, affirmed the dismissal, in respect to appellants Chagnon and Freedman and the other named defendants.

In 50 C.J.S. *Judgments,* Sec. 592, page 11, it is said:

> "The doctrine of res judicata . . . embodies two main rules which may be stated as follows: (1) The judgment or decree of a court of competent jurisdiction on the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal . . . (2) Any right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the

parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same. . . ."

In the "at all fours" case of *Rhodes v. Meyer,* 334 F. 2d 709 (8 Cir. 1964), cert. denied, the plaintiff had similarly brought an action under the Civil Rights Act, in which he had named certain defendants, *including attorneys.*

The District Court had dismissed the complaint, on the ground that it did not state a claim against any of defendants; and *the dismissal was affirmed on appeal,* in *Rhodes v. Houston,* 309 F. 2d 959 (8 Cir. 1962).

Subsequently the same plaintiff brought a new action under the Civil Rights Act in the same District Court, and again named *many of the same defendants* who had already recovered a favorable judgment of dismissal in the prior action (although the later complaint also named other, and new defendants).

The District Court dismissed the second action in favor of all the defendants who had prevailed in the prior judgment, with reliance on the doctrine of *res judicata* (and likewise dismissed in favor of all the newly named defendants, under the principle of *stare decisis*).

On appeal from the second and subsequent dismissal, the Eighth Circuit affirmed, and said, at pages 712, 713, 716:

"The defendants in Meyer and Van Steenberg who were also defendants in Houston asserted the defense of res judicata in their various motions to dismiss and such defense is maintained in these appeals. After a thorough, and we believe accurate,

examination and comparison of each of the actions below with Houston, Judge Delehant [the District Court judge] concluded:

' "[*T*]*his court would be on solid ground if it were to regard Rhodes v. Houston* * * *as dispositive adversely to the plaintiff herein, and in favor of all of the defendants hereto except* [*those who were not prior defendants and the Justices of the Supreme Court of Nebraska who, although prior defendants, were not previously charged as liable in damages*] upon all of the plaintiff's claim herein, insofar as it rests upon facts that existed when the ruling in Rhodes v. Houston * * * was made." 225 F. Supp. 80, 106, Cf. 225 F. Supp. 113, 128.

"The doctrine of res judicata is especially applicable where protracted and multiple litigation of similar issues appears to be in the offing. Thus, without desiring to be repetitive of the extreme detail in which the district court examined the pleadings, this court shall reexamine them to the extent necessary to determine if either res judicata or stare decisis applies thereto.

"This court recently had the occasion to discuss the test of sameness of causes of action and the following test was applied:

> " ' "The primary test for comparing causes of action has long been whether or not the primary right and duty, and the delict or wrong combined are the same in each action. Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 * * *" ' Englehardt v. Bell & Howell Co., 8 Cir., 327 F.2d 30, 32. * * *

"The cases we are considering, and Houston allege similar conspiracies under the same Civil Rights Act. * *

"This court reiterated the applicable rule of res judicata in Englehardt:

" 'The law of res judicata as it relates to claim preclusion is firmly established. In a subsequent action by the same parties, a judgment on the merits in a former action based upon the same cause of action precludes relief on the grounds of res judicata. The judgment is conclusive, not only as to matters which were decided, but also as to all matters which might have been decided.' 327 F.2d 30, 32.

"Judge Delehant correctly determined that the causes of action here asserted are the same as asserted in Houston and that the added facts here pleaded do not make this a different cause of action. The basic wrong for which redress is asked is a conspiracy resulting in plaintiff's alleged wrongful conviction and imprisonment. * * *

"Plaintiff argues on appeal as he did below that res judicata cannot apply in these cases because the decision in Houston was not on the merits but merely on a motion to dismiss. The authorities cited by Judge Delehant at 225 F.Supp. 80, 105, adequately dispose of this argument and they establish that *judgment entered on a motion to dismiss for failure to state a claim on which relief can be granted can support a defense of res judicata in a subsequent action.* Judge Sanborn in Sylvan Beach, Inc., v. Koch, 8 Cir., 140 F.2d 852, 860, quoted from Freeman on Judgments, 5th Ed., Vol. 2

> §740 where it was stated that 'A judgment on the pleadings is on the merits if it determines the merits of the controversy as distinguished from the merits of the pleadings.' See Florasynth Laboratories v. Goldberg, 7 Cir., 191 F. 2d 877; 2 Moore's Federal Practice Para. 12.14 at 2267. *The decisions on immunity of the various defendants in Houston were on the merits and thus preclude redetermination in these cases as to the immunity of these prior defendants:* to wit [naming all defendants who were made parties in the prior litigation]" (Emphasis supplied).

As can be seen in the above italicized portion of the citation from *Rhodes,* that decision expressly holds that the fact that some new parties defendant have been added to a subsequent action (who had not been named in a prior action which had proceeded to judgment) does not prevent application of the doctrine of *res judicata* in favor of those parties who *had* been named as defendants in *both* the prior and subsequent actions. This ruling totally answers appellant's argument, made in Opening Brief, page 5, without the support of any case authority whatever, that the principle of *res judicata* is not applicable in favor of appellees Chagnon and Freedman; because, although these two are named as party defendants in both the 1964 action and the cause at bar, some of "the parties are different" in the current cause—in that some new party defendants, who were not named in the 1964 action, are now included in the current Complaint.

Contrary to appellant's argument, the *Rhodes* case expressly holds that the rule of *res judicata is specifically applicable* to bar the new action against the parties

charged in *both* causes; and it is only those parties who were merely named in the subsequent action, and not in the earlier, who cannot invoke the doctrine of *res judicata.*

Further, on the issue of *res judicata,* see, also, *Crawford v. Zeitler,* 326 F. 2d 119 (6 Cir. 1964), likewise a civil rights action, wherein the plaintiff first brought an action in a District Court of Michigan, and thereafter, after this was dismissed for failure to state a claim, brought another action, against the same defendants, in the District Court of Ohio—each time alleging the same general cause of action (though in different language).

The Ohio District Court dismissed the second cause on the ground of *res judicata,* and the Sixth Circuit affirmed; saying at page 121:

> *"3. Res Judicata*
>
> "Attached to defendant's motion to dismiss were copies of the papers that constituted plaintiff's complaint in the action brought in the Western District of Michigan and which complaint was held in that case not to state a cause of action. *While such complaint was constructed differently and did not employ language identical to the complaint before us, a fair reading of both complaints discloses that as to the defendant-appellee, Zeitler, they both assert the same cause of action.* The Michigan complaint relied on the same civil rights statute as involved in the case at bar. Basic to both are the asserted torts of false arrest, illegal search and seizure and other vaguely described conduct difficult to classify. Defendant-appellee Zeitler, named

as a defendant in the Michigan action and served with process, moved to dismiss the action on the ground of lack of jurisdiction over his person and the complaint's alleged failure to state a cause of action. The District Court sustained Zeitler's motion on both grounds, stating, 'Plaintiff fails to state a claim upon which the monetary relief sought could be granted against defendants * * * Zeitler * * * under the Federal civil-rights statute hereinbefore cited.' Crawford v. Lydick, 179 F.Supp. 211, 213. The fact that the District Judge dismissed the Michigan case on jurisdictional grounds as well as on the merits, does not prevent the Michigan decision on the merits from being res judicata of the cause of action attempted to be relitigated here. Florida Central Railroad Company v. Schutte, 103 U.S. 118, 143, 26 L.Ed. 327, 336. See cases gathered in the annotation at 133 A.L.R. 846."

IV.

The Dismissal of This Cause Can Also Be Sustained Under the Principle of Stare Decisis.

Finally, the within cause is barred in favor of all the defendants named herein—thus, of course, including appellees Chagnon and Freedman—on the basis of the doctrine of *stare decisis;* and the action of the District Court in dismissing the Complaint and entering judgment in favor of these appellees can be sustained on this ground.

Heretofore in this brief, appellees Chagnon and Freedman have cited the case of *Haldane v. Chagnon, et al.,* 345 F. 2d 601, wherein the judgment of dismissal en-

tered in appellant's 1964 action was affirmed by the Ninth Circuit.

Previously in this brief the first *Haldane* case was cited primarily for its language demonstrating that appellees Chagnon and Freedman, as attorneys in private practice, could not be subject to liability under the Civil Rights Act.

In addition, however, the *Haldane* decision serves to support the invocation of the doctrine of *stare decisis* in favor of the dismissal of the current Complaint. Under this principle, this decision—which held that the 1964 complaint must be dismissed—is binding on the District Court—and *this circumstance dictates that the current Complaint* (which, as has been shown, is based on the same cause of action) *must likewise be dismissed.*

In 21 C.J.S. *Courts,* Sec. 197, pp. 343-345, it is said:

> "Decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness, until they have been reversed or overruled. . . ." [then follow literally a hundred citations to U.S. Supreme Court and Federal Court decisions].

In *Rhodes v. Meyer,* 334 F. 2d 709, the civil rights case heretofore reviewed in this brief under Section III, it was held (as shown) that the doctrine of *res judicata* was applicable in favor of those parties who had been defendants in a prior cause, and had recovered

judgment therein, and who were thereafter named in a new and similar action. *Rhodes further holds,* that where, as occurred therein and at bar, there has also been *an appeal* from the earlier judgment, and an affirmation thereof by a court of last resort, *the principle of stare decisis will also serve to exonerate from liability (in any later action brought on the same cause of action) all parties defendant who, as appellees in the earlier action, had received the benefit of the appellate court's decision.* Moreover, *Rhodes* also holds that the same rule of *stare decisis* will even exonerate from liability those defendants who were only named as parties in the latter action, alone. In these respects the opinion says, at pages 716, 717:

> "The trial court held that all defendants in the two actions before us, including those who were defendants in Houston and those who were not, were entitled to have their motions to dismiss sustained upon the basis of stare decisis, stating in support thereof:
>
> > " 'But after thorough study of the present file, and of the factual history to which it directs the court, supra, it has been, and is, considered unnecessary to premise the present ruling either upon the doctrine of *res judicata*, or upon its related rule of estoppel by judgment, and more appropriate to poise it upon the application of the principle of *stare decisis*. . . .' "

Conclusion.

For the foregoing reasons, appellees Chagnon and Freedman respectfully urge that the District Court properly dismissed the Complaint in respect to them, and that the judgment of dismissal entered in their favor should be affirmed.

Respectfully submitted,

JARRETT & WOODHEAD,
Attorneys for Appellee Chagnon
and
BRILL, HUNT, DEBUYS & BURBY,
Attorneys for Appellee Freedman.
By ABE MUTCHNIK,
Admitted to practice before the
Ninth Circuit.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ABE MUTCHNIK